No. 26 and No. 30

Supreme Court of the United States

October Term, 1964

Whitney National Bank in Jefferson Parish,
Petitioner,

v.

Bank of New Orleans and Trust Company, et al.,
Respondents.

James J. Saxon, Comptroller of the Currency,
Petitioner,

v.

Bank of New Orleans and Trust Company, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER WHITNEY NATIONAL BANK IN JEFFERSON PARISH

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Respondents.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER WHITNEY NATIONAL BANK IN JEFFERSON PARISH

These cases are before the Court on writs of certiorari (376 U.S. 948) to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 14, 1963. That court (Miller, J., joined by Washington and Danaher,

JJ.) held that petitioner Whitney National Bank in Jefferson Parish (hereafter "Whitney-Jefferson"), a chartered national bank, was in reality a "branch" of another national bank, and was therefore prohibited from doing a banking business because of the restrictions on the locations of branches of national banks contained in the National Bank Act, 12 U.S.C. § 36(c). The Court of Appeals affirmed a judgment of the United States District Court for the District of Columbia which, on different grounds from those relied on by the Court of Appeals, had granted a declaratory judgment and a permanent injunction against Whitney-Jefferson and the Comptroller of the Currency, petitioners here, forbidding the opening for business of Whitney-Jefferson.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 14, 1963 (R. 478).[1] Timely petitions for rehearing *en banc* were denied on October 17, 1963, Judges Wright and McGowan not participating (R. 479). On March 23, 1964, this Court granted timely petitions for certiorari filed by Whitney-Jefferson and the Comptroller, and consolidated the cases for oral argument (R. 481). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Miller, J.) appears at R. 454 and is reported at 116 U.S. App. D.C.

[1] Record citations herein ("R. ") are to the Transcript of Record in this Court.

285, 323 F.2d 290. The opinion of Judge McLaughlin of the United States District Court for the District of Columbia is printed at R. 444 and is reported at 211 F. Supp. 576, *sub nom. Bank of New Orleans and Trust Co. v. Saxon.*

QUESTIONS PRESENTED

1. Can a national bank which is a bank holding company subsidiary, organized in accordance with the provisions of the National Bank Act and complying with all other federal statutes and regulations, be held to be a "branch" of another separately chartered national bank within the meaning of 12 U.S.C. § 36(c)? In any event, can such a holding properly be based on a factual determination made in the first instance by a court of appeals, on review of a summary judgment based on other grounds, and in the face of contrary sworn material in the record?
2. Is a state statute which purports to prevent the opening of a duly organized national bank, on the ground of state disapproval of the ownership of its stock, in conflict with the National Bank Act and an unconstitutional interference with the operation of the national banking system; and is such a statute arbitrary, discriminatory and confiscatory in violation of the Fourteenth Amendment?
3. May a decision of the Federal Reserve Board, which approved a plan for the operation of a new national bank by a bank holding company pursuant to the Federal Bank Holding Company Act of 1956, be collaterally attacked by

competitor banks in a suit to enjoin the Comptroller of the Currency from authorizing the opening of the new bank? (This question is fully treated in the brief for petitioner Saxon, and petitioner Whitney-Jefferson adopts the arguments made in that brief.)

STATUTES INVOLVED

Article VI, Clause 2, of the Constitution of the United States, the equal protection and due process clauses of the Fourteenth Amendment to the Constitution, the pertinent provisions of the federal banking laws (12 U.S.C. §§ 21-24, 26, 27, 36(c), 36(f), 61, 82, 84, 93, 1841-48), and Louisiana Act 275 of 1962 (6 La. Rev. Stat. §§ 1001-06) are set forth in Appendix A to this brief (pages 58-76).[2]

STATEMENT

Whitney National Bank of New Orleans (hereafter "Whitney-New Orleans") is a national bank located in the City of New Orleans, which is coextensive with the Parish (county) of Orleans. As a national bank, Whitney-New Orleans is prevented from establishing branches outside Orleans Parish by 12 U.S.C. § 36 (c), which provides that national banks may establish branches only within the geographic limits imposed by state law on state banks.[3]

As the New Orleans metropolitan area has expanded,

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[2] Complete statutory citations of these provisions are found in Appendix A and will therefore not be repeated when these provisions are referred to in the text.

[3] State banks in New Orleans with capital of more than $100,000 are prohibited by 6 La. Rev. Stat. §§ 54 and 328 from establishing branches outside Orleans Parish.

Whitney-New Orleans and its urban competitors have found themselves greatly handicapped in being forbidden to follow their customers into that part of the metropolitan area which falls outside the limits of the central city. In particular, Jefferson Parish, adjacent to Orleans Parish, is a rapidly developing part of the New Orleans metropolitan area (R. 100-01). Many residents of Jefferson Parish find it inconvenient to maintain their relations with downtown banks which are precluded from establishing branches in their neighborhoods.

The Whitney Program

Like other downtown banks all over the country faced with the same problem (R. 100), the New Orleans banks have sought means for establishing banking connections in the suburbs, including Jefferson Parish, consistently with the prohibition on branches. Two of Whitney-New Orleans' three principal competitors have solved this problem by establishing "affiliate" or "satellite" banks in Jefferson Parish. The management of Whitney-New Orleans' largest competitor, the National Bank of Commerce of New Orleans, in 1955 induced a majority of its stockholders to organize, as majority owners, a new bank under the name of the National Bank of Commerce in Jefferson Parish (R. 42, 49-58, 116-17). This bank now has five offices in Jefferson Parish. In order to meet the competitive advantage which other downtown banks thus obtained, Whitney-New Orleans determined that it, too, should establish a relationship with a bank in Jefferson Parish.

Accordingly, Whitney also developed a program for the creation of a new national bank in Jefferson Parish. It would be a separate corporation, but through the vehicle of a holding company established pursuant to the

Federal Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-48, it would be under the same ultimate ownership as Whitney-New Orleans. Accordingly, the stockholders of Whitney-New Orleans adopted a plan of reorganization which would result in ownership of the stock of Whitney-New Orleans by Whitney Holding Corporation (Whitney Holding) and ownership of the stock of Whitney Holding *pro rata* by the former stockholders of Whitney-New Orleans.[4] Whitney-New Orleans would continue to conduct a banking business limited to Orleans Parish. Whitney-New Orleans would pay to Whitney Holding, out of its undivided profits available for dividends, a dividend of $650,000.[5] Whitney Holding would use these funds to establish, as a new wholly owned subsidiary, Whitney National Bank in Jefferson Parish (hereafter "Whitney-Jefferson"), which would then conduct a new banking business limited to Jefferson Parish. It was, of course, contemplated that—like its competitors' Jefferson affiliates—Whitney-Jefferson would rely substantially

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[4] The precise corporate steps by which this was accomplished are set out at R. 43-47 and in the District Court's findings, R. 446-47. The Court of Appeals appeared to be somehow troubled by the alleged complexity of these steps, but the extent to which the implementation of the program involved "simple" or "complex" corporate steps is not relevant to any question presented here.

[5] These funds were not part of the "capital" of Whitney-New Orleans, as respondents have repeatedly asserted without foundation. Rather, they represented funds available for dividends, which the stockholders could direct be paid to them as such or be used for any other legal purpose which they chose. See pages 36-38, *infra*.

The initial capital structure of Whitney-Jefferson consists of $500,000 capital, $100,000 surplus, and $50,000 undivided profits (R. 46, 114, 389).

on the management experience which over the years had inspired the confidence of Whitney-New Orleans' customers.

Administrative Proceedings and Approvals

Approval of two federal agencies was necessary before the Whitney program could be put into effect. The Comptroller of the Currency had authority to pass on the reorganization of Whitney-New Orleans and the formation of a new national bank in Jefferson Parish.[6] The Federal Reserve Board had jurisdiction to pass on the use of funds of Whitney Holding to create Whitney-Jefferson and on the acquisition of the stock of that bank by Whitney Holding.[7]

Accordingly Whitney-New Orleans, by detailed applications filed in June and July 1961, submitted its program to Ray M. Gidney, then the Comptroller of the Currency, and to the Federal Reserve Board.[8] On October 3, 1961, after four months' investigation Mr. Gidney approved the reorganization of Whitney-New Orleans and the creation of Whitney-Jefferson, all subject to the approval of the Federal Reserve Board (R. 44). On May 3, 1962, after a public hearing at which interested parties were invited to appear,[9] the Board approved, as in the public interest, the formation of

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[6] 12 U.S.C. §§ 26-27; Act of Sept. 8, 1959, § 20, 73 Stat. 460. 12 U.S.C. § 215 (1958), as amended, 12 U.S.C. § 215 (Supp. V, 1959-63).

[7] 12 U.S.C. §§ 1841-48.

[8] Notice of the filing of the application to the Board was published in the Federal Register on July 28, 1961 (R. 98).

[9] Notice of the hearing was published in the *Federal Register* on December 23, 1961, and in the New Orleans newspapers (*e.g.*, New Orleans Times-Picayune, December 20, 1961, § 3, p. 24, col. 1). The public hearing was held on January 17, 1962 (R. 98).

Whitney Holding and its acquisition of the two proposed banking subsidiaries (R. 96). None of the present respondents appeared or registered any objection to the Whitney program (R. 61).

On May 10, 1962, Whitney-Jefferson executed and delivered to the new Comptroller of the Currency[10] its articles of association and its certificate of organization, thereby establishing its corporate existence as a national banking association in accordance with 12 U.S.C. § 24. (See R. 392-94.) On May 18, 1962, the Comptroller approved the final corporate formalities necessary to complete the program (R. 34, 46). On May 24, 1962, the duly elected and qualified directors of Whitney-Jefferson adopted by-laws and took action by which the new bank became a member of the Federal Reserve System (R. 46, 390).

Thereafter, the sole remaining legal step necessary to permit the opening of Whitney-Jefferson for business was the issuance to it by the Comptroller, under 12 U.S.C. § 27, of a certificate authorizing it to commence the business of banking. The Comptroller was about to issue such a certificate when this action was commenced on June 9, 1962 (R. 6, 16, 47). Whitney-Jefferson was prepared to open its doors for business, and would have commenced operations virtually as soon as it received a certificate (R. 16, 27, 47, 115-31, 181-84, 329, 390-91).

Proceedings in the Lower Courts

The original plaintiffs in this action, three Louisiana state banks, claimed that they would lose business if Whitney-Jefferson were allowed to open (R. 16-19,

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[10] James J. Saxon succeeded Ray M. Gidney as Comptroller on November 16, 1961. Prior to that time, as we have seen, the Whitney program had been fully examined and approved by Mr. Gidney.

253). Contending that Whitney-Jefferson was a "branch" of Whitney-New Orleans and therefore illegal under 12 U.S.C. § 36(c), they sought a declaratory judgment and an injunction against the Comptroller prohibiting him from issuing his certificate. Whitney-Jefferson intervened as a defendant (R. 40-41, 228-29). For a time thereafter, the Comptroller voluntarily withheld issuance of his certificate. Beginning on June 27, 1962, he was enjoined from issuing it *pendente lite*, first by a temporary restraining order and subsequently by a preliminary injunction (R. 176-77, 272-73).

After the complaint was filed, the plaintiff banks and their allies took quick action on another front. On June 27 there was introduced into the Louisiana legislature, and July 10 the legislature passed, a statutory provision forbidding any subsidiary of a bank holding company to open for business if it had not yet done so. 6 La. Rev. Stat. § 1003(5). As shown more fully at pages 52-54, *infra*, this entirely new prohibition was directed specifically at Whitney-Jefferson and at Whitney-Jefferson alone. Its purpose was to prevent the functioning of an existing national bank without regard to the authorizations granted it by the competent federal agencies. The plaintiffs promptly urged Section 1003(5) upon the District Court as an additional reason why Whitney-Jefferson should not be permitted to open. The State Bank Commissioner of Louisiana, a respondent here, intervened as a plaintiff in this action on the ground that his duties included the enforcement of the new statute (R. 346-58).

All parties moved for summary judgment. The District Court held that the Comptroller was precluded from issuing his certificate by Section 1003(5), and

further held that this subsection is constitutional as applied to national banks in general and to Whitney-Jefferson in particular. The court declined to decide whether Whitney-Jefferson should be treated as an illegel "branch" of Whitney-New Orleans. R. 449-50. 211 F. Supp. at 578, and accordingly made no findings bearing on that question.

Petitioners appealed. Briefing and oral argument were directed primarily to the constitutionality of the Louisiana statute. The Court of Appeals, however, passed that issue by, and instead held that Whitney-Jefferson was an illegal branch of Whitney-New Orleans. The court relied principally on a finding of intent based on statements made by the president of Whitney-New Orleans to the Whitney stockholders and to the federal regulatory agencies.

> "The facts . . . show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one. The president of Whitney-New Orleans frankly made this quite clear." R. 475. 116 U.S. App. D.C. at 298, 323 F.2d at 303.

The Court of Appeals so held notwithstanding the fact that the District Court had not found—and had never been asked by respondents to find—that Whitney-New Orleans intended to operate Whitney-Jefferson in any particular manner, let alone "as if the institutions were one." Had respondents raised any such issue of fact, a trial would have been required, since petitioner and the Comptroller vigorously denied that there was any intent so to operate Whitney-Jefferson (R. 388-91) and would have introduced evidence in support of their denial. Nor did the Court of Appeals consider whether

any such intent, even had it existed, could possibly have been put into effect.

The Fifth Circuit Action

The present action represents only one of two legal proceedings through which the respondents have sought to frustrate the Whitney program. On June 13, 1962, two of the present respondents filed in the Court of Appeals for the Fifth Circuit, under Section 9 of the Federal Bank Holding Company Act, 12 U.S.C. § 1848, a petition for review of the Federal Reserve Board's order approving the Whitney program. *Bank of New Orleans v. Board of Governors of the Federal Reserve System*, 5th Cir. No. 19,788 (R. 288). On October 7, 1963, the Court of Appeals for the Fifth Circuit ordered that it would withhold its decision in that action pending the result of the case presently before this Court.

SUMMARY OF ARGUMENT

I

The Court of Appeals erred in holding that, despite its lawful organization pursuant to the Federal Bank Holding Company Act of 1956, the Whitney Holding Corporation program was tantamount to the establishment by Whitney-New Orleans of a "branch" in Jefferson Parish in violation of the prohibition resulting from 12 U.S.C. § 36(c). The court ignored the nature and history of twentieth-century banking, a major element of which has been the development of holding company banking as an alternative to branching in situations where branching is prohibited. Unable to obtain all the advantages of branching, bankers have settled for some of those advantages rather than have none. Bank holding companies are frequently, as in the

present case, established by the management of a metropolitan bank, which becomes the nucleus and central management of the banking group. These facts, and the similarities and distinctions between branch banking and holding company banking, have been well known to bankers, the regulatory agencies, and Congress for decades.

(A) Congress on two occasions has made an informed and deliberate decision not to subject bank holding companies to the restrictions of 12 U.S.C. § 36 (c) on the locations of bank branches. In enacting the Banking Act of 1933, Congress considered the whole problem of federal supervision of bank holding companies and formulated a regulatory system from which any restriction on the locations of holding-company-owned banking offices is conspicuously absent. In the 1950's, Congress, in fashioning a comprehensive scheme for the supervision of bank holding companies (the Federal Bank Holding Company Act of 1956), specifically considered a proposed provision which would have subjected holding-company-owned banking offices to the same restrictions on location as those to which branches are subject, but rejected it as "an arbitrary tie-in with branch banking laws" (page 25, *infra*). This legislative history is dispositive of the present issue, since it shows that Congress has expressly rejected respondents' argument.

(B) There is, moreover, no basis for concluding that Whitney-Jefferson is or could be "in reality" a "branch" of Whitney-New Orleans. The federal laws governing national banks and bank holding companies carefully prevent a bank holding company from achieving in practical operation the unitary type of organization characteristic of branch banking. Only some

by no means all, of the advantages of branching can be had through bank holding companies. Since the differences between the two types of organization are substantial rather than merely formal, Whitney-Jefferson could not, without violation of federal law, operate as if it were a branch office of Whitney-New Orleans.

Nonetheless, the Court of Appeals found that the Whitney officials "intended" to operate Whitney-Jefferson as if it were a branch of Whitney-New Orleans, and, apparently, that the Whitney Holding system had certain characteristics which the court regarded as distinguishing it from "the traditionally recognized bank holding company" (page 34, *infra*). Not only would the supposed "intent" have been futile in light of the law governing national banks; there was also no factual basis for finding it to exist. The statements by the Whitney management on which the Court of Appeals relied amounted to no more than expressions of a desire to have a Whitney-related bank in Jefferson Parish—the sort of purpose for which bank holding companies are habitually organized. The court could read sinister intent into these statements only by misunderstanding the usual nature and purposes of holding company banking. Moreover, since intent is a question of fact, it was error for the Court of Appeals to rely on its own speculations as to this unlitigated factual issue.

There was nothing unusual—as the court apparently thought—about the source of Whitney-Jefferson's capital, the fact that it would be under common control with Whitney-New Orleans, or the similarity of the names of the two banks. Common control is ordinarily the result of common ownership, and similar names are not untypical of holding company banking. As to capi-

tal, the court ignored the fact that the funds in question were undivided profits belonging to the stockholders and could lawfully be used as they saw fit. Whitney Holding Corporation is indistinguishable in form, substance, intent or effect from the traditional, well-recognized and congressionally approved bank holding company in operation throughout the United States as a partial alternative to branch banking.

II

Nor can the Court of Appeals result be upheld on respondents' alternative argument under 6 La. Rev. Stat. § 1003(5), which purports to prohibit any new bank from opening for business if 25 per cent of its stock is owned by a bank holding company. As applied to national banks in general and to Whitney-Jefferson in particular, this section is unconstitutional.

(A) Louisiana's Section 1003(5) trespasses unconstitutionally upon the federally preempted field of the organization and chartering of national banks. The National Bank Act contains a series of provisions, 12 U.S.C. §§ 21-28, which this Court has held constitutes "by itself a complete system for the establishment . . . of national banks, prescribing the manner in which they may be formed . . . ." *Cook County Nat'l Bank v. United States*, 107 U.S. 445. The statute in unambiguous terms authorizes the Comptroller of the Currency to charter a new national bank which has complied with all requirements of federal law alone, without reference to state law. A state statute attempting to impose additional requirements on a national bank before it may do business is, therefore, invalid as in conflict with the National Bank Act, an interference

with a federal instrumentality performing federal functions, and an invasion of a legislative field which Congress has preempted. Under the settled jurisprudence of this Court, a state may not regulate national banks in a way that interferes with their full performance of their functions. *A fortiori*, a state may not keep a national bank, such as Whitney-Jefferson, out of business altogether.

(B) This conclusion is not affected by Section 7 of the Federal Bank Holding Company Act, 12 U.S.C. § 1846, which merely preserves existing state jurisdiction in the holding company field and "does not grant any new authority to States over national banks." S. Rep. No. 1095, 84th Cong., 2d Sess., pt. 2, at 5 (1956). Whatever may be the permissible range of state regulation of national bank holding companies, there can be no doubt that the Louisiana statute is unconstitutional as an unprecedented state attempt to prevent an existing national bank from doing business.

(C) Respondents are, further, precluded from justifying 6 La. Rev. Stat. § 1003(5) as legitimate bank holding company regulation because that section is arbitrary, discriminatory, *ad hoc* legislation drafted and designed to apply only to Whitney-Jefferson. Its enactment was part of a scheme in which the respondent banks procured improvidently granted restraining orders so as to delay consummation of an entirely legal program until they could manufacture a new state law to make it illegal. Even if the legislation were constitutional on its face, revelation of its discriminatory purpose would require it to be held invalid. *Gomillion v. Lightfoot*, 364 U.S. 339; *Griffin v. School Board of Prince Edward County*, 377 U.S. 218.

ARGUMENT

I

WHITNEY NATIONAL BANK IN JEFFERSON PARISH IS NOT A "BRANCH" OF WHITNEY NATIONAL BANK OF NEW ORLEANS WITHIN THE MEANING OF 12 U.S.C. § 36(c).

In the United States three types of multiple-office banking have developed: branch banking, chain banking and holding company banking. Branch banking exists when a single banking corporation conducts its operations from more than one office, *i.e.*, through branches. In chain banking, a number of separately incorporated banks (sometimes referred to as affiliates) are controlled through interlocking stock ownership by the same individual or individuals. Holding company banking (sometimes called group banking) exists when a controlling stock interest in two or more banks is owned by a single corporation, known as a bank holding company.[11]

Such considerations as customer convenience, heightened competition, the growth of large business corporations, and greater mobility of funds have created a steadily increasing need in the late nineteenth and twentieth centuries for banking systems more extensive than the small one-office banks traditional in this country. However, national banks were, in general, forbidden to take the natural course of opening branches until 1927,[12] when Congress passed the McFadden Act,

[11] These definitions are in universal use today. See, *e.g.*, "Branch, Chain and Group Banking," in BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING STUDIES 113, 125, 130 (1941).

[12] The National Bank Act, Act of June 3, 1864, c. 106, 13 Stat. 99, which created the national banking system, contained no provision

44 Stat. 1224, allowing national banks to establish branches within their own cities if state law permitted state banks to do the same. Section 23 of the Banking Act of 1933, 48 Stat. 189, which with minor amendments is the present branch banking law, 12 U.S.C. § 36(c), further permitted national banks to branch throughout a state subject to the limits imposed on state banks by state law.

Because of legal restrictions on branch banking, banks have resorted—both before and since 1927—to the alternative methods of chain banking and holding company banking so as to obtain as many of the advantages of branch banking as may legally be had. Commonly, the chain or holding company system develops out of a preexisting metropolitan bank, which, with its experienced management, becomes the nucleus of the system of affiliates or subsidiaries. Holding company banking in particular has become a widespread feature of the banking business of this country. Congress enacted the Federal Bank Holding Company Act of 1956 to regulate this expanding phenomenon and give the Federal Reserve Board jurisdiction over it. By December 31, 1963, 52 bank holding companies, conducting operations in 32 states, had registered with the Board pursuant to the Act. Banks owned by these companies were operating 1,732 banking offices, or 6.5 per cent of all commercial banking offices in the country, with 8.2 per cent of the commercial banking de-

for the establishment of branch offices by national banks. It was eventually held that the Act prohibited branches, First Nat'l Bank v. Missouri, 263 U.S. 640, except in certain rare cases. See Fordham, *Branch Banks as Separate Entities*, 31 Colum. L. Rev. 975, 976 (1931).

posits in the United States.[13] The creation of Whitney-Jefferson, like the adoption of chain banking by other New Orleans banks (page 5, *supra*), was merely one incident in this development.

To be sure, chain banking and holding company banking are second-best alternatives to branch banking. The fact that both involve the establishment of separately chartered institutions imposes serious limitations (described more fully hereafter[14]) under the National Bank Act. For example, unlike a branch office, an affiliate or holding company subsidiary is limited by the amount of its own capitalization in the amount of debt it may incur and the size of loans it may make. However, important benefits do accrue from cooperation between related banks with substantial identity of ownership and management. Establishment of a holding company offers the further advantage of assuring continuing identity of ownership, whereas stockholdings in affiliates in a chain banking system may come through transfers to differ one from the other. On the other hand, holding company systems are subject to countervailing disadvantages because of the additional restrictions of the Federal Bank Holding Company Act (detailed at page 29, *infra*) on relationships among subsidiaries. Depending upon particular circumstances, one form or the other may therefore be more desirable in a situation where branching is not permitted. The creation of Whitney-Jefferson reflected a decision in favor of the holding company approach.

The history of this development of three distinct

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[13] 1964 Fed. Reserve Bull. 783.

[14] Pages 28-31, *infra*.

types of multiple-office banking and the reasons for it have been traced in a number of scholarly works and are wholly familiar to the banking community and the regulatory agencies. A few pertinent excerpts from the literature relating to chain banking and holding company banking, describing the reasons for their use and their similiarities to and differences from branch banking, are collected in Appendix B to this Brief, pages 76-79, *infra*.

Congress, the courts and the regulatory agencies have recognized and given effect to the similarities and distinctions among these various types of banking organization. Indeed, the Court of Appeals for the District of Columbia Circuit itself recently pointed out the differences between branch banking and chain banking.[15] But in the case at bar, the Court of Appeals closed its eyes to the accepted genuine conceptual and practical differences between branch banking and holding company banking and to Congress' express determination that holding company subsidiaries should be free of some of the restrictions imposed on branches. Moreover, the Court of Appeals based its decision on its own wholly irrelevant and improper factual determination that petitioner "intended" to establish a branch in the guise of a co-subsidiary.

The holding of the Court of Appeals rests upon a moralistic extension of a dialectical error. The dialectical error is that things which have some characteristics in common are identical. The moralistic extension is that one who uses an implement which has characteristics in common with a forbidden implement is illegally

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[15] Camden Trust Co. v. Gidney, 112 U.S. App. D.C. 197, 301 F. 2d 521 (1962) (Washington, Danaher and Bastian, JJ.), *cert. denied*, 369 U.S. 886.

evading an edict of law. Let us illustrate: the farm bloc, in order to impede suburban vegetable gardening, induces the legislature to forbid the use of hoes. A man says to his friends, "Do not despair. A rake will do well enough to get two-thirds of a crop. True, it will not dig rows, or make mounds, or chop out weeds; but it will break up the surface, remove stones, and so on. Let's do the best we can with rakes." The Court of Appeals would declare him in violation of the law, because it would think that he intended to use a rake as if the implement were the same thing as a hoe.

But the fact of the matter is that a rake is not the same thing as a hoe. And if the rake wielder can further show that the same legislature that forbade the use of hoes has made provision for the licensing of rakes, and that in conformity with that provision he has a license to use his rake as he intends to use it, surely on more considered judgment the Court of Appeals will be held to have been wrong.

Such is the situation here.

A. *CONGRESS HAS DELIBERATELY CHOSEN NOT TO SUBJECT BANK HOLDING COMPANIES TO THE LEGAL RESTRICTIONS ON LOCATIONS OF BRANCHES OF NATIONAL BANKS.*

Congress has been fully aware of the development of bank holding companies and of the reasons for that development. Congressional committees on numerous occasions heard the views of the federal regulatory bodies and of private interests, including the Independent Bankers Association, which regularly argues that holding company banking is an evasion of restrictions on branch banking. See, *e.g.*, *Lamb, Group Banking* 40, 179-80 (1961). On two separate occasions Congress

has made clear its informed decision to regulate branch banking and holding company banking differently, particularly with respect to restrictions on the locations of banking offices. One of these occasions was the enactment in 1933 of the crucial statutory provision here in question, 12 U.S.C. § 36(c). On the other occasion, in 1956, Congress rejected a proposal which would have made this provision expressly applicable to holding company banking.

(1) THE BANKING ACT OF 1933

The present provision governing branch banking by national banks—12 U.S.C. § 36(c), the section which the Court of Appeals interpreted as prohibiting the existence of Whitney-Jefferson—originated in the Banking Act of 1933. 48 Stat. 162, 189. The drafting of the 1933 Act followed a broad and lengthy congressional inquiry into the development of holding company banking, its nature and its purposes.[16] The

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[16] For example, the testimony of John W. Pole, then Comptroller of the Currency, included a classic exposition of the developing role of bank holding companies in the light of restrictions on branching:

> "Local holding companies have been formed in many sections of the country for the purpose of bringing together a number of the banks into a single operating group. The usual procedure is for the holding company, a State corporation, to purchase a majority of the stock of several banks, one of which would be a large city bank which in effect becomes the parent bank of the group. The management personnel of the central bank becomes in practice the responsible management for the entire group. Through such a group system it appears to be possible to make a close approach to a form of branch banking whereby

legislative history shows that Congress (1) was fully aware of the characteristics of holding company banking, (2) formulated a very different system of regulation to deal with it, and (3) deliberately refrained from subjecting it to the provisions of Section 36(c), which prescribes the conditions in which branches may be established.

Sections 5(c), 19 and 27 of the Banking Act of 1933, 48 Stat. 165, 186, 191-92, imposed a number of restrictions on bank holding companies. These provisions, with a few amendments, remain in force today.[17] They contain no restriction on the locations at which offices of banks owned by the same bank holding company may operate.[18] Congress could easily have applied Section 36(c), as well, to holding company banking had it so wished. Instead it carefully applied Section 36(c) only to branches,[19] and enacted the very

each operating unit leans for support upon the central bank, or upon the holding company, and receives the benefits of its moral and financial support; its prestige and good will; its extension of the wider type of banking service; and the benefits of its highly trained management." *Hearings Before the House Committee on Banking and Currency Under House Resolution 141 (Group, Chain and Branch Banking)*, 71st Cong., 2d Sess., vol. 1, pt. 1, at 5 (1930). (See also *id.* at 26.)

[17] 12 U.S.C. § 61; 48 Stat. 191 (1933), as amended, 12 U.S.C. § 161 (1958), as amended, 12 U.S.C. § 161 (Supp. V, 1959-63); 48 Stat. 162, 165, 192 (1933), as amended, 12 U.S.C. §§ 221a, 334, 481 (1958). See pages 30-31, *infra*, for a discussion of some of these restrictions.

[18] S. Rep. No. 77, 73d Cong., 1st Sess. 10-11 (1933), describes holding company banking and explains the reasons for the particular forms of regulation chosen.

[19] The branch banking statute contains a partial definition of the term "branch," 12 U.S.C. § 36(f), set forth in Appendix A, page 61.

different set of provisions just mentioned to deal with holding company banking.

(2) THE FEDERAL BANK HOLDING COMPANY ACT OF 1956

The Federal Bank Holding Company Act of 1956 and its legislative history disclose even more clearly the repeated decision of Congress not to subject bank holding companies to the geographic restrictions on the locations of bank branches. This Act (12 U.S.C. §§ 1841-48) was passed after eighteen years of Congressional study. It contains a comprehensive scheme for federal regulation of bank holding companies and their subsidiaries. Congress was fully aware that such companies frequently own and operate banks in circumstances where a single bank would be prohibited from maintaining branches. Congress considered many different techniques and proposals for the regulation of bank holding companies, and enacted those which it determined were most desirable. Wholly absent from the Act, though it had been proposed, is a requirement that any or all holding company operations conform to the restrictions on location applicable to branch banking.

Efforts were made in both the House and the Senate

infra. Unfortunately that definition is not helpful in resolving the present problem. The wording and content of Section 36 as a whole, however, make it plain that a "branch" is envisaged as being part of a single corporation. *Cf* 12 U.S.C. §§ 601-04, referred to in Section 36(g), which make a clear distinction between establishment of branches and stock ownership in separately chartered banks. 38 Stat. 273 (1913), as amended, 12 U.S.C. §§ 601, 602, 604 (1958); 39 Stat. 755 (1916), as amended, 12 U.S.C. § 603 (1958). Respondents' argument that Whitney-Jefferson is a "branch" within the actual language of Section 36(c), without any necessity for "piercing the corporate veil," is therefore without merit.

to apply the geographic restrictions on branch banking to bank holding company operations. The proposed language read:

> "Nothwithstanding any other provision of this section, no application shall be approved under this section which will permit . . . (2) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such State . . . ." H.R. 6227, S. 880, § 5(e). 84th Cong., 1st Sess. (1955).

This section was included in the bill as it was reported by the House Banking and Currency Committee and as it passed the House. The House Committee, in support of its version, argued that the differences between branch banking and holding company banking were "differences without a distinction," so that it was appropriate to "base holding company legislation on branch banking law." [20]

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[20] H.R. Rep. No. 609, 84th Cong., 1st Sess. 3 (1955). To the same effect see the remarks of Chairman Spence of the House Banking and Currency Committee, floor manager of the House bill. 101 Cong. Rec. 8021 (1955). These sources have repeatedly been quoted by respondents as part of the legislative history of the Federal Bank Holding Company Act. The point, of course, is that these contentions that branch banking and holding company banking should be treated alike were made in support of the House version of the bill, which Congress eventually rejected. Respondents are simply rearguing an issue which Congress decided adversely to them eight years ago.

In the Senate, however, the differences between these two forms of banking were thought to be significant, and the view that holding companies should be regulated differently from branches prevailed in the legislation as finally enacted. Extended testimony and arguments for and against the House approach were presented to a subcommittee of the Senate Committee on Banking and Currency.[21] The Senate Committee, after full consideration, reported to the Senate a bill that eliminated the proposed tie-in with the branch-banking law. The Committee gave its reasons for rejecting that proposal as follows:

> "*The committee decided against inclusion of a provision in the bill that would automatically apply State laws concerning branch banking to bank holding company operations.* The purposes of branch banking laws are not identical with the purpose of this bill to control bank holding companies. Moreover, branch banking is mostly conducted by the use of depositors' funds, thus making the protection of these funds of prime importance. Bank holding companies, however, as such have no depositors. For operating funds they have recourse to equity capital supplied by their shareholders. *It is believed the bill contains adequate provisions to regulate bank holding company operations without an arbitrary tie-in with branch banking laws.*" S. Rep. No. 1095, 84th Cong., 1st Sess., pt. 1, at 11 (1955). (Italics added.)

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[21] *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency (Control of Bank Holding Companies),* 84th Cong., 1st Sess. 45, 47-48, 77-78, 80-82, 85, 89-90, 104-05, 107, 111, 112-29 (1955).

The statute as enacted incorporates the Senate, not the House, approach. The House concurred in the Senate amendments without sending the bill to conference. The statute expressly permits the purchase of bank stock by a bank holding company upon approval by the Federal Reserve Board. The Board is directed to consider five factors in deciding whether to approve or disapprove an application for such approval. 12 U.S.C. § 1842(c). Conspicuous by its absence is any provision that the application must be disapproved if Section 36(c) would prohibit the establishment of a branch in the same circumstances. That proposal Congress expressly rejected.

It may be that a court is sometimes justified in applying to situation *B* a statute that in terms reaches only situation *A* when *A* and *B* are very similar and it is clear that the legislature would have covered *B* had it had that variant of the problem in mind. There is no justification for such an application where, as here, the legislature had *B* very clearly in mind, but deliberately refused to apply the statute to it. Congress was told by a sponsor of the legislation that through the holding company device some bankers had "circumvented the branch banking laws and accomplished something that the branch banking laws had attempted to prevent." 101 *Cong. Rec.* 8021 (1955) (Rep. Spence). In the face of this argument Congress deliberately deleted from the bill it sent to the President a provision which adopted Representative Spence's view and would have permitted bank holding company subsidiaries to operate only where branches could operate. The judiciary may not write the deleted provision back into the statute by treating as a branch what is in fact a co-

subsidiary. This would be true even if the only differences between Whitney-Jefferson as a co-subsidiary of Whitney-New Orleans and Whitney-Jefferson as a branch of Whitney-New Orleans were differences of form. In fact, largely because of the restrictions that Congress did choose to impose upon bank holding companies, there are, as we shall now show, very significant differences of substance between the two situations.

B. *THE COURT OF APPEALS' DETERMINATION THAT WHITNEY-JEFFERSON WOULD "TO ALL INTENTS AND PURPOSES" BE A BRANCH IN EVASION OF THE LAW WAS UNFOUNDED.*

Even if Congress had not made explicit its considered decision—which the Court of Appeals did not even discuss—that the form of organization chosen by petitioner is determinative so far as the applicability of the branch banking law is concerned, there would be no basis for the Court of Appeals' conclusion that "in reality" Whitney-Jefferson would operate as if it were a branch of Whitney-New Orleans. Of course, holding company banking is similar in some practical respects to branch banking, just as both forms are similar in some practical respects to chain banking. But in its myopic concentration on these common elements, the Court of Appeals lost sight of the crucial practical respects in which the planned relationship between the two Whitney banks would differ from that between two branches of a single institution. Insofar as the Court believed that the two banks could—regardless of intent—be operated as one, it erred as a matter of law. Insofar as it found an intent to operate Whitney-Jefferson as a branch and not in accordance with the nor-

mal pattern of holding company banking, it erred as a matter of fact. Moreover, in making such a factual determination on a record indicating the contrary, when the District Court had not even considered the question, it exceeded its jurisdiction as an appellate court.

To demonstrate that two separately chartered subsidiaries of a single holding company (such as Whitney-New Orleans and Whitney-Jefferson) could not possibly be operated as are two branches of a single bank, it is necessary to look no further than the text of the federal banking laws. The crucial distinctions will become apparent if we examine the statutory rules governing some of the most basic rights and obligations of banks and of those who deal with them: their depositors, their borrowers, their shareholders.

(1) *Their Depositors:* Each deposit in a branch office of a bank has the same status as a deposit in the main office, and is backed by the combined capital and assets of the entire bank. Since the branch has no separate assets, it cannot become insolvent unless the whole combined operation fails, and in that event all depositors would have claims against the entire assets of the bank. In contrast, Whitney-Jefferson, as a separately incorporated national bank, is alone responsible for deposits made with it. Its solvency or insolvency would be determined with reference only to its separate assets, consisting of $500,000 in capital, $100,000 in surplus, and $50,000 in undivided profits, and would be unaffected by Whitney-New Orleans' $30,000,000 capital and surplus.[22] Upon insolvency depositors could look only to Whitney-Jefferson's assets and would

[22] Rev. Stat. § 5242 (1875), 12 U.S.C. § 91 (1958).

have no claim on those of the city bank.[23] Only Whitney-Jefferson's own directors would be liable for a violation by that bank of the National Bank Act. 12 U.S.C. § 93. Whitney-Jefferson could not contract debts in excess of its own capital, $500,000. 12 U.S.C. § 82.

If the two banks were operated as one, their capital, assets and obligations would be mingled by definition, as are those of branches. But the Federal Bank Holding Company Act of 1956 prevents any mingling of funds between a bank holding company and a subsidiary or among subsidiaries. Whitney-New Orleans may not invest any of its funds in obligations of Whitney-Jefferson, 12 U.S.C. § 1845(a)(1); or accept obligations of Whitney-Jefferson as collateral for a loan, 12 U.S.C. § 1845(a)(2); or purchase any securities, assets or obligations from Whitney-Jefferson under repurchase agreements. 12 U.S.C. § 1845 (a)(3). Perhaps most important, Whitney-New Orleans may not make any loan, discount or extension of credit to Whitney-Jefferson. 12 U.S.C. § 1845(a)(4). These restrictions all operate equally against Whitney-Jefferson. Moreover, they prevent transfers or other transactions between either bank and the holding company, and hence between the two banks through the vehicle of the holding company.

(2) *Their Borrowers:* If the two banks were operated as one, Whitney-Jefferson could make loans to any

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[23] 19 Stat. 63 (1876), as amended, 12 U.S.C. § 191 (1958), as amended, 12 U.S.C. § 191 (Supp. V, 1959-63); Rev. Stat. § 5234 (1875), as amended, 12 U.S.C. § 192 (1958), as amended, 12 U.S.C. § 192 (Supp. V, 1959-63); Rev. Stat. §§ 5235-38 (1875), 12 U.S.C. §§ 193-96 (1958); 19 Stat. 63 (1876), as amended, 12 U.S.C. § 197 (1958), as amended, 12 U.S.C. § 197 (Supp. V, 1959-63); 24 Stat. 8 (1886), 12 U.S.C. §§ 198-200 (1958).

one borrower in any amount up to $3,000,000, that is, ten per cent of the total of its capital and surplus combined with those of Whitney-New Orleans. But as a separate bank it is limited to loans of only $60,000. 12 U.S.C. § 84. Any attempt by Whitney-Jefferson to make a loan in excess of its own loan limit based on its own separate assets would lead to immediate revocation of its charter and personal liability of its directors under 12 U.S.C. § 93.[24]

(3) *Their Shareholders:* The shareholders of a single bank with multiple branch offices may, of course, directly control the operations of the bank and all its offices. But the shareholders of the holding company which owns the two Whitney banks have no such normal full and direct control over its subsidiary banks. This is the result of the restrictions which the "holding company affiliate" provisions of the Banking Act of 1933 impose upon a bank holding company in the control of its subsidiaries. The most dramatic of these restrictions forbids a holding company to vote its bank stock without first applying to the Federal Reserve Board for a voting permit, which the Board may grant

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[24] The Court of Appeals attached significance to a statement by the President of Whitney-New Orleans that Whitney-Jefferson's depositors would have "access to the large loan limits of the combined banks." R. 471, 116 U.S. App. D.C. at 296, 323 F. 2d at 301. This statement meant no more than that, if Whitney-Jefferson received a request for a loan in excess of its loan limit, it could offer a participation in that loan to Whitney-New Orleans. Most banks, independent and otherwise, frequently share large loans with other banks. It is natural and customary for a bank holding company subsidiary to offer participations to its co-subsidiaries in preference to banks under different ownership. This was expressly recognized by the court in First Nat'l Bank in Billings v. First Bank Stock Corp., 306 F. 2d 937, 942 (9th Cir. 1962).

or withhold in its discretion. 12 U.S.C. § 61. The same section imposes restrictions on the dividends which may be paid by a bank holding company, and requires the holding company to maintain reserves of readily marketable assets other than the bank stocks which it owns. None of these restrictions apply to a bank operating two or more offices.

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Despite the obvious fact that these statutory limitations on holding company operations would render ineffectual any plan to operate Whitney-Jefferson as if it were a branch of Whitney-New Orleans, the Court of Appeals found, after describing the Whitney plan, that

> "The facts already recited sufficiently show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one." R. 475, 116 App. D.C. at 298, 323 F.2d at 303.

This finding of fact was not only irrelevant, but also unsupported by the record and improperly made by the Court of Appeals in the posture of the case before it.

Intent is, of course, a question of fact. In this case, it was a question on which the District Court made no findings and heard no evidence, since it decided the case on summary judgment without reaching the branch banking issue. Nor did the parties go into the factual question of intent when the branch banking issue was raised in the District Court. Respondents did not even allege such an intent, either in their complaint (R. 6-20)

or in the statement of facts supporting their motion for summary judgment (R. 275-93).[25]

The Court of Appeals appears to have believed that the record revealed undisputed facts supporting its inference as to Whitney-New Orleans' intent. It stated that "the President of Whitney-New Orleans [Mr. Berry] frankly made this quite clear" (R. 475, 116 U.S. App. D.C. at 298, 323 F.2d at 303). So far as appears, the court relied almost entirely upon Mr. Berry's statements to the stockholders of Whitney-New Orleans explaining and justifying the proposed program and upon statements made concerning the program by the regulatory agencies which approved it. The Court of Appeals apparently ignored the undisputed sworn affidavit (R. 388-91) of Mr. Gilly, the President of Whitney-Jefferson, which affirmatively shows that it was not intended that the two banks be operated as one. That affidavit shows, for example, that "Whitney-Jefferson will operate a banking house entirely separate from that of Whitney-New Orleans" (R. 388); that the banks would have only one officer or employee in common, and that their boards of directors are not the same; that "Whitney-Jefferson has and will maintain its own books of account and its own stationery, checks and forms, none of which mention Whitney-New Orleans" (R. 389); and that Whitney-Jefferson would not deviate from normal banking practices regarding accepting deposits for accounts in, and

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[25] Respondents did allege that Whitney-Jefferson was *in law* a "branch" and that the purpose of the Whitney program was to "evade" the branch banking laws; but these are patently conclusory assertions which do not amount to an allegation of fact regarding Whitney-New Orleans' intent as to how Whitney-Jefferson would be operated.

cashing checks drawn on, other banks, including Whitney-New Orleans.

Even if the Court of Appeals' view of Whitney-New Orleans' intent were not thus contradicted by sworn statements in the record, it would have been inappropriate for the Court of Appeals to decide such a question on summary judgment. The record contained scant evidence on the question of intent, since that factual issue had not been raised in the District Court. The statements by Mr. Berry upon which the Court of Appeals relied were not testimony, and he had no opportunity to explain them in the context in which they were used by the Court of Appeals. The Court of Appeals' apparent determination that "motive and intent play leading roles" in this case required it to heed this Court's admonition that summary judgment should be used sparingly in such a situation. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473. In view of the material in the record contrary to the Court of Appeals' view, it was even more clearly error for that court—if it thought that intent was crucial—to fail to remand the case for a trial at which the facts could be fully developed and the issue resolved. *E.g., Fountain v. Filson*, 336 U.S. 681; *Kennedy v. Silas Mason Co.*, 334 U.S. 249; *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426; *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620.

Moreover, the statements by Mr. Berry upon which the Court of Appeals relied (R. 470-76, 323 F.2d at 301-04) support no inference of intent to evade any statute by operating the two Whitney banks as one. Passing the point that if Mr. Berry believed that this could be done he would have been the most bemused banker in the national banking system, it is enough

that he did not say anything so foolish. What he did do was to point out to the stockholders—as any number of banking authorities, official and otherwise, had pointed out before him; see Appendix B, pages 76-79, *infra*—those benefits of branch banking which Congress permitted under a bank holding company plan approved by the federal authorities. Far from being "a very good description of a branch banking operation," as the Court of Appeals characterized it (R. 471, 116 U.S. App. D.C. at 296, 323 F.2d at 301), what Mr. Berry said was rather "a very good description" of those advantages which could be properly achieved through the holding company form of organization in a situation where "a branch banking operation" is not permitted.

The Court of Appeals appears to have been of the view that the Whitney holding system would not violate the branch banking provision of the National Bank Act but for certain peculiar characteristics said to distinguish it from "the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks" (R. 474, 116 U.S. App. D.C. at 298, 323 F. 2d at 303). The court was at pains to point out such distinguishing characteristics in an effort to reconcile its decision in the present case with its own earlier decision in *Camden Trust Co. v. Gidney*, 112 U.S. App. D.C. 197, 301 F.2d 521 (1962), *cert. denied*, 369 U.S. 886, and the decision of the Court of Appeals for the Ninth Circuit in *First Nat'l Bank in Billings v. First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962). In *Camden Trust*, the court had held that a chain banking affiliation arrangement did not constitute forbidden branching.[29]

[29] After the Comptroller had denied an application for the establishment of a branch, the directors of the Haddonfield National

In *Billings*—the only litigation prior to the present case in which it has been argued that a bank holding company subsidiary was really a branch—the Ninth Circuit rejected the argument, holding that "the unitary type of operation characteristic of branch banking is not present" (306 F.2d at 943).[27]

The Court of Appeals stated the supposed distinctions between the Whitney holding plan and what it

Bank established a new national bank. They expressly declared to Haddonfield's shareholders, under the letterhead of that bank, that the reason for establishing the new bank was that Haddonfield was prohibited from operating a branch at the location in question. 112 U.S. App. D.C. at 199, 301 F. 2d at 523, n. 7. As in the present case, a competitor bank challenged the authority of the Comptroller to charter the new bank on the ground that it was in substance a forbidden branch. Rejecting this contention, the court simply recited the various statutory provisions that would make it impossible for two national banks to be operated as though they were one. 112 U.S. App. D.C. at 200-01, 301 F. 2d at 524-25. It should be noted that the *Camden* arrangement was not subject to the additional restrictions deriving from the Federal Bank Holding Company Act of 1956 which apply in the present case. A commentator has noted that "*Camden* and *Whitney* are somewhat difficult to reconcile . . . ." James F. Bell, *National Bank Branches—the Authority To Approve and To Challenge*, 19 Bus. Law. 887, 900 (1964).

[27] The Court of Appeals here relied, R. 475, 116 U.S. App. D.C. at 298, 323 F. 2d at 303, on the statement in *Billings*, 306 F. 2d at 942, that "in the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it." Since in *Billings* the court was concerned with an alleged branch which was already in operation, it had no occasion to inquire whether the "realities" of banking regulation could *ever* permit two separately chartered banks to operate as one. Moreover, the alleged branch in *Billings* was a state bank rather than a national bank, and thus a number of the regulatory restrictions discussed here were not applicable.

regarded as the usual—and hence presumably proper—chain banking or bank holding company arrangement as follows:

> ". . . [1] [T]he holding company is not providing Whitney-Jefferson with new and fresh capital, but with capital supplied by Whitney-New Orleans; [2] the new bank will be managed and controlled by the executives of Whitney-New Orleans; and [3] the name, Whitney National Bank in Jefferson Parish . . . is easily susceptible of confusion with the parent organizer, The Whitney National Bank of New Orleans." R. 477, 116 U.S. App. D.C. at 299, 323 F.2d at 304.

Any such implication that the perfectly normal transactions involved in the creation of Whitney Holding and Whitney-Jefferson constituted an "elaborate and ingenious scheme" (R. 470, 323 F.2d at 301) of vaguely dubious and deceptive "corporate maneuvering" (R. 476, 323 F.2d at 304) is false. It can derive only from misunderstanding of the transactions involved or lack of familiarity with the nature and development of modern banking as already described (pages 16-20, *supra*).

(1) *Source of capital.* The court's statement that the funds with which the new bank was set up were not "new and fresh capital," but rather "capital supplied by Whitney-New Orleans," reflects confusion either about the nature of the reorganization or about the meaning of the word "capital." Withdrawal of "capital" from a national bank "either in the form of dividends or otherwise" is prohibited by law. Rev. Stat. § 5204 (1875), 12 U.S.C. § 56 (1958). No one claims that this provision has been violated. The funds for the new

bank had never previously been part of the capital funds of Whitney-New Orleans or any other bank. They came in fact from undivided profits of Whitney-New Orleans, upon which federal and state income taxes had been paid, and which were available for dividends.[28] These funds belonged to the stockholders of Whitney-New Orleans, who, instead of taking payment individually, directed that the funds be paid as a dividend to the new holding company, also owned by them, after it became the single stockholder of Whitney-New Orleans.

If instead these funds had been paid as a dividend to the individual stockholders of Whitney-New Orleans and used by them to establish the new bank, they would have constituted "strictly fresh" capital within the highest standards of the egg market. It made no difference that the stockholders instead chose to have these earnings paid as a dividend to the new single stockholder—the holding company—to be used by it for the same purpose. Surely the funds lost none of their "freshness" by the use of this route. Nor did it make any difference—as the Court of Appeals asserted in its attempt to distinguish the *Billings* case—whether the holding company was a preexisting one (whose funds presumably would have come from previously paid-out earnings of its subsidiary bank or

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[28] Although respondent banks originally asserted that the capital of Whitney-Jefferson came from the capital funds of Whitney-New Orleans (*e.g.*, R. 432) and alternatively that it came from the surplus of Whitney-New Orleans (R. 433-34), they have subsequently admitted that Whitney-New Orleans had undivided profits far in excess of the amount needed to capitalize Whitney-Jefferson. See, *e.g.*, page 5 of their Brief in Opposition to Petitions for Certiorari

banks) or a new one.[29] In either case, the holding company's funds are equally "its own."

(2) *Control.* The court's second point was that the new bank would be subject to ultimate management and control by the executives of the metropolitan bank. Of course it would. As the court pointed out in the *Billings* case,

> "This [identical over-all management and common policies] is a usual, although not necessary, result of common ownership and control." 306 F.2d at 942. See also, *e.g.*, *Lamb, Group Banking* 80 (1961).

As amply made clear by the authorities collected in Appendix B, pages 76-79, *infra*, this is the most common purpose of establishing a bank holding company. Congress was well aware of this fact when it sanctioned bank holding companies in the Federal Bank Holding Company Act of 1956. See *e.g.*, S. Rep. No. 1095, 84th Cong., 1st Sess., pt. 1, at 2 (1955). That statute itself prohibits bank holding companies from engaging in any business *other than* "that of banking or of managing or controlling banks." 12 U.S.C. § 1843(a)(2).

Perhaps the Court was troubled because it thought that the typical, and only proper, bank holding company situation is one in which a separate management deals, rather distantly, with managements of a number of subsidiary banks of about the same size and strength. But this is not ordinarily the case. In fact, a bank hold-

[29] The court in *Billings* never mentioned where the holding company there involved got the funds to capitalize the alleged branch, and accordingly attached no relevance to it. The funds presumably came from the same source as here, that is, funds available for dividends in the member banks of the holding company system.

ing company usually grows up around a central metropolitan bank as a nucleus, and, particularly in the early stages of its development, the management of the holding company is likely to be identical with that of the central bank. See Appendix B, page 76, *infra*, and n. 16, page 21, *supra*. In short, it is normal for bank holding companies, like most other owners, to control the banks which they own.[30]

(3) *Names*. The court's third point is that the name Whitney National Bank in Jefferson Parish is susceptible of confusion with the name Whitney National Bank of New Orleans. The name of a new national bank is subject to the discretionary approval of the Comptroller, 12 U.S.C. § 22, and the name of Whitney-Jefferson has been approved by him. In this case the name of course would suggest, and was meant to suggest, close connection between the banks and the benefits of experienced and reliable management, high integrity and the best banking connections. These are normally recognized characteristics of holding company banking.

One factor that the Comptroller properly could and did consider in exercising his discretion is that the Jefferson Parish affiliate of the National Bank of Commerce of New Orleans, Whitney-New Orleans' largest competitor, is named the National Bank of Commerce in Jefferson Parish (R. 42). Such similarity of names is a not uncommon characteristic of holding company banking. See R. 339 and Lamb, *Group Banking* 140 (1961).

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[30] The exercise of such control, however, is limited—in the Whitney system as in all other bank holding company systems—by the provisions of law described at pages 30-31, *supra*.

The Court of Appeals' opinion is an exercise in unreality. Not only does it ignore Congress' explicit and determinative decisions, on two occasions, that the geographic restrictions applicable to branch banking should not apply to holding company banking. It also ignores the real distinctions between these forms of organizations underlying and flowing from those Congressional decisions. A holding company subsidiary organized under the applicable law is different from a branch. It simply cannot operate as a branch, regardless of the "intent" of its principals or any peculiar circumstances or particular situations.

The decision of the Court of Appeals appears to involve the unstated holding that an alleged intent to do something impossible of achievement may render an otherwise legal undertaking illegal. One may legitimately wonder how the Comptroller and the Federal Reserve Board would be expected to apply the Court of Appeals' ruling in passing on applications to charter new banks or to acquire bank stock. Must they inquire whether the bank officials in question have at any time made any statement to their stockholders, to the agencies themselves, or to any one else which could be construed as indicating an intent to operate two banks as though they were one—even though the Comptroller and the Board know perfectly well that no such effort could succeed without violation of law and forfeiture of the bank charters?

Despite the natural judicial attraction for "piercing the corporate veil," there is simply no occasion for doing so here. For there is nothing concealed behind the supposed "veil."

II

A STATE STATUTE PURPORTING TO PROHIBIT A NATIONAL BANK FROM DOING BUSINESS IN THAT STATE IS UNCONSTITUTIONAL.

Neither court below adopted the ground for decision upon which the other rested. The District Court held that the opening of Whitney-Jefferson is prohibited by 6 La. Rev. Stat. § 1003(5), which reads in relevant part as follows:

> "It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued."

The Court of Appeals' decision cannot, however, be justified on this ground. If applied to national banks, Louisiana's Section 1003(5) violates the Supremacy Clause (art. VI, cl. 2) of the Constitution of the United States, because it is in conflict with the National Bank Act, a valid federal statute, and interferes with the lawful federal function of establishing and maintaining a national banking system. Moreover, as arbitrary, discriminatory, *ad hoc* legislation, it also violates the equal protection and due process clauses of the Fourteenth Amendment.

A. *CONGRESS HAS PREEMPTED THE FIELD OF THE ORGANIZATION AND CHARTERING OF NATIONAL BANKS.*

National banks are regulated principally by the National Bank Act, first enacted a century ago to establish a national banking system, and since then frequently amended. The Act includes a series of provisions in

which Congress has set forth a comprehensive system for the organization, establishment and commencement of business of national banks, including a complete prescription of the standards such a bank must meet in order to receive federal authorization. 12 U.S.C. §§ 21-28.

Section 21 of Title 12 provides for articles of incorporation. Section 22 provides for the execution of an organization certificate and its transmission to the Comptroller of the Currency. Section 24 provides that a national banking association shall become a body corporate "as from the date of the execution of its organization certificate," and sets forth in great detail the corporate powers of such associations. Section 26, which is particularly important here, then requires the bank to notify the Comptroller that it has "complied with all the provisions of *this chapter*[31] [the National Bank Act] required to be complied with before an association shall be authorized to commence the business of banking." The Comptroller is then directed to conduct an investigation into a number of matters specifically named, "and generally whether such association has complied with all the provisions of *this chapter* required to entitle it to engage in the business of banking."

Section 27 then provides that as a result of his "examination of the facts *so reported*" the Comptroller shall determine whether "such association is *lawfully* entitled to commence the business of banking," and if so shall issue a certificate attesting "that such association has complied with *all the provisions* required to

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[31] The italics in this and the following paragraphs have been added. Sections 26 and 27 are set forth in full in Appendix A, pages 59-60, *infra*.

be complied with before commencing the business of banking." The Comptroller may withhold his certificate "whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by *this chapter.*" In this context, nothing could be more clear than that the word "lawfully" refers to the requirements of the National Bank Act alone and not to the law of any state.[32] The Act does not even instruct the Comptroller to consult with state authorities or to notify them of his intention to charter a new national bank.

These provisions plainly express a Congressional intent to preempt the field of the establishment and chartering of national banks. This Court has so held. "[T]he National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks'." *Deitrick v. Greaney*, 309 U.S. 190, 194. The Court was there quoting from *Cook County Nat'l Bank v. United States*, 107 U.S. 445, where it had declared:

> "We consider that act [the National Bank Act] as constituting by itself a complete system for the *establishment* and government of national banks, *prescribing the manner in which they may be*

[32] The Comptroller's certificate itself states: "Whereas, satisfactory evidence has been presented to the Comptroller of the Currency that . . . [name of bank] has complied with *all provisions of the statutes of the United States* required to be complied with before being authorized to commence the business of banking as a National Banking Association; Now, therefore, I hereby certify" that the bank may commence business. R. 311. (Italics added.) This language has appeared, without substantial change, in the certificate ever since the beginning of the national banking system in 1863, and is thus evidence of the long-standing official construction of the statutory language.

formed, . . . [etc.]. Everything essential to the *formation* of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, *as in a separate code by itself*, neither limited nor enlarged by other statutory provisions. . . ." 107 U.S. at 448. (Italics added.)

In *Cook County* the Court used this reasoning to hold inapplicable to national banks certain *federal* legislation which on its face was broad enough to apply to them.[33] Obviously the Court would have held any attempted *state* interference with the establishment of a national bank to be precluded.

The Louisiana statute not only trespasses upon a field lawfully preempted by Congress, but does so in a manner in plain conflict with the provisions of federal law. The National Bank Act says that the Comptroller may issue his certificate if he finds that the applicant has complied with all the provisions of that Act itself, and the national bank may then commence the business of banking. Louisiana, as its statute is interpreted by the District Court, now says that compliance with the National Bank Act is not enough; the Comptroller may not issue his certificate and the bank may not open unless it has complied with further requirements imposed by state law. These statutes are incompatible; one or the other must give way.

McCulloch v. Maryland, 4 Wheat. 316, upholding the right of the Federal Government to maintain a national

[33] The precise question was whether provisions of the bankruptcy law giving the United States, when a creditor, a priority in the assets of "any insolvent person" applied to the assets of a national bank. The Court held that they did not.

banking system unimpeded by a state tax thereon, was the first of a long line of decisions holding various kinds of attempted state interference with national banks unconstitutional. The states have been held without power, for example, to regulate the distribution of the assets of insolvent national banks (*Davis v. Elmira Savings Bank*, 161 U.S. 275, 283), to regulate the right of insolvent national banks to receive deposits (*Easton v. Iowa*, 188 U.S. 220), and to prohibit national banks from using such words as "savings" in their names or advertisements (*Franklin Nat'l Bank v. New York*, 347 U.S. 373). No federal statute expressly authorized the use of the words at issue in *Franklin*, but the Court held that such use was implicitly authorized by provisions permitting national banks to accept savings deposits.

These cases struck down state legislation which affected the operation of national banks in ways which this Court believed to impair their proper functioning as federal instrumentalities.[34] The Louisiana statute here in question goes much farther. It attempts to frustrate completely the act of a duly authorized fed-

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[34] These principles were again affirmed during the last term in Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555, where the Court held a state decision that a national bank could be sued in a certain state court to be inconsistent with controlling federal law. See also First Nat'l Bank v. California, 262 U.S. 366; Nat'l Bank v. Commonwealth, 9 Wall. 353, 362; American Surety Co. v. First Nat'l Bank, 141 F. 2d 411 (4th Cir. 1944); Starr v. O'Connor, 118 F. 2d 548 (6th Cir. 1941); Dinan v. First Nat'l Bank, 117 F. 2d 459 (6th Cir. 1941), *cert. dismissed*, 315 U.S. 824; Cooper v. O'Connor, 70 U.S. App. D.C. 238, 105 F. 2d 761 (1939); American Surety Co. v. Baldwin, 90 F. 2d 708 (7th Cir. 1937); Brust v. First Nat'l Bank, 184 Wis. 15, 198 N.W. 749 (1924); 7 Michie, Banks and Banking, c. 15, § 5 (1944).

eral official in creating a national bank pursuant to the provisions of the National Bank Act, by preventing the bank from doing business. This state statute, if upheld, would prevent a federal instrumentality—a duly chartered national bank—from functioning at all. It would be difficult to imagine state legislation more clearly in conflict with the Congressional preemption of the field of the organization and chartering of national banks.

B. *THE CONGRESSIONAL PREEMPTION WAS NOT WITHDRAWN BY SECTION 7 OF THE FEDERAL BANK HOLDING COMPANY ACT OF 1956.*

Respondents claim, and the District Court held, that Congress, by enacting Section 7 of the Federal Bank Holding Company Act of 1956, gave the states the power to do what Louisiana has done here. Section 7 reads in its entirety as follows:

> "The enactment by Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof." 12 U.S.C. § 1846.

It is clear from the face of this section that it neither increased nor reduced preexisting state power, but merely expressed Congress' intention not to preempt entirely the field of bank holding company regulation. Any regulation of bank holding companies which a state could constitutionally undertake before the passage of the Act, it could continue. Any regulation which would previously have been unconstitutional would re-

main so.[35] Congress went out of its way to make this altogether clear. The Senate Report stated:

> "A great deal of concern has been expressed that section 7 of this bill [12 U.S.C. § 1846] . . . granted new authority and powers to States over national banks in general, and respecting the stocks of national banks in particular. . . .
>
> "In order to clarify the legislative history of section 7, the committee wishes to emphasize that *this Section does not grant any new authority to States over national banks.* The purpose of the section is to preserve to the States those powers which they *now* have in our dual banking system. It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks, and section 7 must be viewed in that light." S. Rep. No. 1095, 84th Cong., 2d Sess., pt. 2, at 5 (1956). (Italics added.)[36]

Since Section 1846 simply makes it clear that Congress in 1956 wished neither to expand nor to contract the scope of permissible state regulation, respondents must give some reason *other than* Section 1846 for their contention that the Louisiana statute may constitution-

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[35] *Cf.* Federal Power Commission v. Southern California Edison Co., 376 U.S. 205.

[36] *Cf.* also *Hearings on S. 76 and S. 1118 before the Senate Committee on Banking and Currency*, 83d Cong., 1st Sess., pt. 2, at 144, 204 (1953); *Hearings on S. 76 and S. 1118 before the Senate Committee on Banking and Currency*, 83d Cong., 2d Sess., pt. 3, at 281-86, 311, 658 (1954); *Hearings on S. 880, S. 2350, and H.R. 6227 before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess. 133-34, 136, 299-300, 307, 320-21 (1955).

ally be applied to a national bank in spite of the federal preemption of the field of the chartering and establishment of national banks. This they cannot do.

Whatever may be the permissible range of state regulation of national bank holding companies, it is clear that Louisiana's Section 1003(5) does not fall within this range. The District Court relied upon two state cases upholding state legislation dealing with bank holding companies. *Braeburn Securities Corp. v. Smith*, 15 Ill. 2d 55, 153 N.E.2d 806 (1958), *appeal dismissed*, 359 U.S. 311; *Opinion of the Justices*, 102 N.H. 106, 151 A.2d 236 (1959). These cases involved statutes[37] of a type enacted in a number of states prohibiting, from the effective date of the statute, (1) the organization of any new bank holding companies, and (2) any additional acquisitions of bank stock by existing bank holding companies. Indeed, this was the nature of Louisiana Act 275 as originally introduced. Although the Illinois and New Hampshire decisions are by no means immune from attack insofar as the statutes sustained by them affect the ownership of stock in national banks,[38] they need not be passed upon here

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[37] The New Hampshire case was an advisory opinion, and the legislation only proposed.

[38] Neither state court focused on the question whether a state attempt to regulate the ownership of stock of national banks violates the Supremacy Clause because of the "complete system for the establishment and government of National Banks" contained in the National Bank Act. Deitrick v. Greaney, 309 U.S. 190, 194. Any disposition of this question would require consideration of cases holding that REV. STAT. § 5139 (1875), 12 U.S.C. § 52, which provides for transferability of national bank stock, prevails over provisions of state law that restrict such transferability. *E.g.*, McClellan v. Merchants' & Miners' Nat'l Bank, 77 Colo. 302, 236 Pac. 774 (1925); see Scott v. Pequonnock Nat'l Bank, 15 Fed.

because, contrary to the District Court's statement that the statutes involved were "similar" to the Louisiana statute (R. 437, 211 F. Supp. at 578), the eleventh-hour amendment adding Section 1003(5) is an assertion by Louisiana of a wholly different and unique type of jurisdiction.

Whereas the statutes approved by the Illinois and New Hampshire courts prohibit future acquisitions of bank stock by new or existing bank holding companies, Louisiana's Section 1003(5) attempts to prohibit an already chartered and existing national bank from doing business because, prior to the enactment of the statute, a holding company had acquired an interest in its stock. Section 1003(5) represents a unique departure in that its impact is not on the stockholders of a bank, who may be subject to the state's jurisdiction, but on a national bank itself, which as far as all essentials of its opening and operation are concerned is not subject to the state's jurisdiction. On analysis, it is no different from a state statute purporting to require the closing of an operating national bank because of a new state legislative determination disapproving of the owner-

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494 (S.D.N.Y. 1883); Equitable Life Assurance Society v. Moore, 29 F. Supp 179 (E.D. Ill. 1939).

Although the Illinois court in *Braeburn* stated correctly that in the Federal Bank Holding Company Act "Congress did not manifest an intent to preempt the legislative field" (153 N.E. 2d at 810), the court gave no consideration to whether the National Bank Act preempted the field of the regulation of stock ownership of national banks. An examination of the papers on file at this Court shows that the appellant did not urge the applicability of the National Bank Act. See Statement as to Jurisdiction and Briefs, U.S. Supreme Court, October Term 1958, No. 718. The dismissal of the appeal by this Court thus cannot be construed as an expression of opinion on the merits of that question.

ship of its stock, for example, on the ground that more than a certain percentage is owned by a religious or a labor organization. Whether or not the state could require the stockholder to divest itself of its interest in the bank, it would be absurd to suggest that it could require the bank to close its doors unless the stock was disposed of. Such a result would, however, follow from a decision sanctioning Louisiana's Section 1003(5).[39]

To be sure, a state might in some circumstances be able to achieve the same practical result by forbidding a holding company to own stock in a bank as by forbidding the bank to operate so long as its stock is owned by a holding company. But this would not be so in all cases. For example, a number of bank holding companies own stock in national banks located in states other than those in which such bank holding companies are incorporated or do business. In such a situation the state where the bank is located has no jurisdiction over the bank holding company and could certainly not require it to divest itself of its national bank stock. Thus the types of attempted state regulation involved are by no means identical.

The substantial and practical differences between genuine holding company regulation and Section 1003(5) are well illustrated by the facts of the present case. If Louisiana had enacted a statute regulating

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[39] Moreover, Section 1003(5) would prevent a national bank from opening without regard to the rights of the majority shareholders if a minority of, say, 30 per cent of its stock were owned by a bank holding company. This is a very different matter from a possibly constitutional requirement that the holding company dispose of its 30 per cent stock interest, which would affect neither the business operations of the bank nor the rights of the majority shareholders.

bank holding companies—a statute forbidding new acquisitions by bank holding companies, or even a statute requiring divestiture of prior-acquired stock—the Comptroller could and would have granted his certificate here, and Whitney-Jefferson could have opened. The attempted state regulation of the stock ownership of the bank, and the constitutionality of such regulation, would be a matter between the state and the bank holding company. The bank would be open for business; the state's attempt to regulate its ownership would have no effect on its ability to perform the functions for which it was chartered by the Federal Government, and it would be performing those functions today. Thus the difference between bank holding company regulation and what Louisiana has done here could not possibly be greater: in the one case the bank would be in operation, and in the other case it is not.

Section 1003(5) as applied in the case at bar is, therefore, not an instance of state regulation of holding companies of the kind that may be sanctioned by 12 U.S.C. § 1846, but an instance of forbidden state regulation of national banks themselves. This is so notwithstanding the possibility that the goal of both types of regulation might be the same. Whether or not a state goal of preventing the ownership of national banks by holding companies is a constitutional goal, and whether or not constitutional means can be found to achieve that goal, Louisiana's Section 1003(5) clearly represents the choice of an unconstitutional means. The statute is vitiated by its attempt to exercise a forbidden direct jurisdiction over national banks in an area that has been preempted by Congress.

C. THE LOUISIANA STATUTE VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

As the Court of Appeals recognized, Louisiana's Section 1003(5) "admittedly . . . was passed to prohibit the opening of Whitney-Jefferson" (R. 460, 116 U.S. App. D.C. at 290, 323 F. 2d at 295). Respondents likewise appear to concede that Section 1003(5) was "hurriedly passed to prohibit the new [Whitney] holding company" (R. 428).

Section 1003(5) was first introduced in the Louisiana legislature on June 27, 1962—eighteen days after the complaint was filed in this action—as an amendment to a bill prohibiting the formation of new bank holding companies and new acquisitions of bank stock by existing bank holding companies (R. 151-57, 207, 314). As originally drafted, the pending bill, House Bill No. 1221, would not have affected Whitney Holding Corporation's ownership of Whitney-Jefferson, which was already an existing fact, or the right of Whitney-Jefferson to open for business upon receiving proper authorization from the federal authorities.

The "class" of banks covered by the amendment has only a single member—Whitney-Jefferson. Since at all times since the amendment was introduced Whitney-Jefferson has been the only existing bank holding company subsidiary in Louisiana not open for business, and since the other sections of the act prohibit the creation of new subsidiaries, the "class" can never have another member. Section 1003(5) was originated by John Oulliber, President of the National Bank of Commerce of New Orleans, Whitney-New Orleans' principal competitor, which, as pointed out at page 5, *supra*, has an affiliate bank

in Jefferson Parish (R. 149). It was sponsored and advocated by a small group of bankers comprising the management of the National Bank of Commerce and of the Bank of New Orleans and Trust Company, respondent here (R. 149). It was recognized during the debate in the legislature that the sole purpose of the amendment was to destroy Whitney-Jefferson.[40]

But for the commencement of this action a few days earlier by one of the banks sponsoring this amendment and others, Whitney-Jefferson would, as shown at page 8, *supra*, already have opened for business before the legislation designed to thwart it could be rushed through the legislature. The Comptroller had voluntarily withheld issuance of his certificate of authority after the complaint was filed, and on June 27, 1962, the very day the amendment was introduced, he was enjoined from issuing it by a temporary restraining order which was followed by a preliminary injunction (R. 176-77, 272-73). The amendment was then quickly adopted by the legislature as part of the general holding company bill which was enacted into law as Louisiana Act 275 of 1962 on July 10, 1962. Having been certified by the Governor as "emergency" legislation, the act, including Section 1003(5), became effective on the same day (R. 290, 296, 301), while the preliminary injunction was still keeping Whitney-Jefferson's doors shut.

Having failed to contest the Whitney program—

[40] There is no official report of the debates in the Louisiana legislature. The best sources for these debates are contemporaneous newspaper reports. See New Orleans States-Item, June 28, 1962, § 1, p. 6, col. 1; New Orleans Times-Picayune, June 28, 1962, § 1, p. 14, col. 1; New Orleans States-Item, July 5, 1962, § 1, p. 2, col. 4; and New Orleans Times-Picayune, July 5, 1962, § 1, p. 22, col. 1.

which had been a matter of public record for many months—before the Federal Reserve Board, respondents and their allies nonetheless at the eleventh hour contrived to prevent implementation of that program by ingenious manipulation of the federal judicial and state legislative systems. By procuring temporary restraints on the basis of an unmeritorious claim that violation of the federal branch banking law was threatened, they gained time to manufacture an *ad hoc* state statute designed permanently to foreclose the implementation of the program without reference to the federal branch banking law (R. 253, 271-72, 428). Had Whitney-Jefferson not been restrained by the temporary orders improvidently granted in this action—improvidently granted because respondents' contention on the merits of the "branch" issue was palpably erroneous—the entire maneuver would have failed.

If Louisiana had arbitrarily singled out Whitney-Jefferson for specific mention in Section 1003(5), there would of course be no question that the statute was unconstitutional. See *Morey v. Doud*, 354 U.S. 457. Since its purpose to penalize Whitney-Jefferson is clear, the fact that the statute is superficially couched in general regulatory terms cannot save it. *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 102-03, 112, 114-15; see *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 85-87. Even if constitutional on its face, legislation must fall when it is shown to be directed towards a discriminatory or otherwise unconstitutional objective. *E.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339; *Griffin v. School Board of Prince Edward County*, 377 U.S. 218; *Bush v. Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569; *Bush v. Orleans Parish School Board*, 191 F.

Supp. 871 (E.D. La. 1961), *aff'd per curiam*, 367 U.S. 908. Even if Section 1003(5) were otherwise constitutional, the state, by lending its power to this devious scheme to destroy Whitney-Jefferson, denied petitioner the equal protection of the laws and deprived it of property without due process of law, in violation of the Fourteenth Amendment to the Constitution.

As already demonstrated, the temporary restraining order and preliminary injunction were improvidently granted, since respondents' cause of action on the "branch" issue was clearly without merit. In addition, these orders were wrongfully issued because no possibility of irreparable injury to the respondents was shown. Counsel for petitioner expressly stated that petitioner was willing to commit itself to closing and dissolving the Jefferson Parish bank if respondents should ultimately prevail on the merits (R. 187-88, 265-66). That commitment precluded any possibility that respondents could be injured by the opening of the bank. If it should now be held that the Louisiana statute is constitutional, then it is petitioner that would suffer irreparable injury from the granting of the temporary orders, unless this Court now makes petitioner whole by restoring it to the status quo as of the times those orders were entered—that is, by permitting Whitney-Jefferson to open for business without regard to the Louisiana statute, which at those times was not law. The case is governed by the familiar rule that a preliminary injunction should not be granted unless the party seeking it can show irreparable injury, particularly if to grant the injunction would work irreparable injury upon the other party. See, *e.g.*, *Yakus v. United States*, 321 U.S. 414, 439-40.

The case is, therefore, a proper one for this Court

to apply the general principle of equity stated in *Arkadelphia Co. v. St. Louis S.W. Ry.*, 249 U.S. 134, 145-46: "It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process." As already demonstrated, Whitney-Jefferson was fully entitled to open for business at the times the temporary restraining order and the preliminary injunction were improvidently issued. This Court can and should restore Whitney-Jefferson to that position, both because the Louisiana statute is unconstitutional and because that statute would never have applied to Whitney-Jefferson had it not been for the wrongful action of the District Court for the District of Columbia. Even if the Louisiana statute were otherwise constitutional, the Court should hold it ineffective to prevent the opening of Whitney-Jefferson because of the means by which and the purposes for which it was adopted, and in the exercise of the Court's equitable power to redress the wrong done to petitioner by the abuse of the process of a lower federal court.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with instructions to enter summary judgment for the petitioners. If the Court should hold that, despite the impossibility of operating two national banks as though they were one, whether Whitney-New Orleans intended so to operate them is the controlling issue, then the case should be remanded to the District Court for trial.

Respectfully submitted.

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APPENDIX A

Statutes Involved

1. *CONSTITUTION OF THE UNITED STATES, ARTICLE VI, CLAUSE 2*

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. *CONSTITUTION OF THE UNITED STATES, ARTICLE XIV OF AMENDMENT, SECTION 1*

. . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. *NATIONAL BANK ACT, REV. STAT. §§ 5133, 5134, 5135, 5136, 5168, 5169, 5155, 5144, 5202, 5239 (1875); AS AMENDED, 12 U.S.C. §§ 21, 22, 23, 24, 26, 27, 36(c), 36(f), 61, 82, 84, 93 (1958), AS AMENDED, 12 U.S.C. §§ 24, 26, 61, 82, 84 (SUPP. V, 1959-63).*

§ 21. Formation of national banking associations; incorporators; articles of association.

Associations for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

§ 22. Organization certificate.

The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall include the word "national" and be subject to the approval of the Comptroller of the Currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this chapter.

§ 23. Acknowledgment and filing of certificate.

The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

§ 24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—. . . . [There follow eight paragraphs of corporate powers.]

* * * *

§ 26. Comptroller to determine if association can commence business.

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that

all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.

§ 27. Certificate of authority to commence banking.

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.

* * * *

§ 36. Branch Banks.

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following: . . .

* * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

* * * *

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent. . . .

§ 61. Right of shareholders to vote; holding company affiliates; voting permits.

In all elections of directors, each shareholder shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and in deciding all other questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him; except that . . . (4) shares controlled by any holding company affiliate of a national bank shall not be voted unless such holding company affiliate shall have first obtained a voting permit as hereinafter provided, which permit is in force at the time such shares are voted, but such holding company affiliate may, without obtaining such permit, vote in favor of placing the association in voluntary liquidation or taking any other action pertaining to the voluntary liquidation of such association. . . .

For the purposes of this section shares shall be deemed to be controlled by a holding company affiliate if they are owned or controlled directly or indirectly by such holding company affiliate, or held by any trustee for the benefit of the shareholders or members thereof.

Any such holding company affiliate may make application to the Board of Governors of the Federal Reserve System for a voting permit entitling it to vote the stock controlled by it at any or all meetings of shareholders of such bank or authorizing the trustee or trustees holding the stock for its benefit or for the benefit of its share holders so to vote the same. The Board of Governors of the Federal Reserve System may, in its discretion, grant or withhold such permit as the public interest may require. In acting upon such application, the Board shall consider the financial condition of the applicant, the general character of its management, and the probable effect of the granting of such permit upon the affairs of such bank, but no such permit shall be granted except upon the following conditions:

(a) Every such holding company affiliate shall, in making the application for such permit, agree (1) to receive, on dates identical with those fixed for the examination of banks with which it is affiliated, examiners duly authorized to examine such banks, who shall make such examinations of such holding company affiliate as shall be necessary to disclose fully the relations betwen such banks and such holding company affiliate and the effect of such relations upon the affairs of such banks, such examinations to be at the expense of the holding company affiliate so examined; (2) that the reports of such examiners shall contain such information as shall be necessary to disclose fully the relations between such affiliate and such banks and the effect of such relations upon the affairs of such banks; (3) that such examiners may examine each bank owned or controlled by the holding company affiliate, both individually and in conjunction with other banks owned or controlled by such holding company affiliate; and (4) that publication of individual or consolidated statements of condition of such banks may be required;

(b) After five years after June 16, 1933, every such holding company affiliate (1) shall possess, and shall continue to possess during the life of such permit, free and

clear of any lien, pledge, or hypothecation of any nature, readily marketable assets other than bank stock in an amount not less than 12 per centum of the aggregate par value of all bank stocks controlled by such holding company affiliate, which amount shall be increased by not less than 2 per centum per annum of such aggregate par value until such assets shall amount to 25 per centum of the aggregate par value of such bank stocks; and (2) shall reinvest in readily marketable assets other than bank stock all net earnings over and above 6 per centum per annum on the book value of its own shares outstanding until such assets shall amount to such 25 per centum of the aggregate par value of all bank stocks controlled by it;

(c) Notwithstanding the foregoing provisions of this section, after five years after June 16, 1933, (1) any such holding company affiliate the shareholders or members of which shall be individually and severally liable in proportion to the number of shares of such holding company affiliate held by them respectively, in addition to amounts invested therein, for all statutory liability imposed on such holding company affiliate by reason of its control of shares of stock of banks, shall be required only to establish and maintain out of net earnings over and above 6 per centum per annum on the book value of its own shares outstanding a reserve of readily marketable assets in an amount of not less than 12 per centum of the aggregate par value of bank stocks controlled by it, and (2) the assets required by this section to be possessed by such holding company affiliate may be used by it for replacement of capital in banks affiliated with it and for losses incurred in such banks, but any deficiency in such assets resulting from such use shall be make up within such period as the Board of Governors of the Federal Reserve System may by regulation prescribe and the provisions of this subsection, instead of subsection (b) of this section, shall apply to all holding company affiliates with respect to any shares of bank stock owned or controlled by them as to which there is no statutory liability imposed upon the holders of such bank stock.

* * * *

(e) Every such holding company affiliate shall, in its application for such voting permit, (1) show that it does not own, control, or have any interest in, and is not partic-

ipating in the management or direction of, any corporation, business trust, association, or other similar organization formed for the purpose of, or engaged principally in, the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, debentures, notes, or other securities of any sort (hereinafter referred to as 'securities company'); (2) agree that during the period that the permit remains in force it will not acquire any ownership, control, or interest in any such securities company or participate in the management or direction thereof; (3) agree that if, at the time of filing the application for such permit, it owns, controls, or has an interest in, or is participating in the management or direction of, any such securities company, it will, within five years after the filing of such application, divest itself of its ownership, control, and interest in such securities company and will cease participating in the management or direction thereof, and will not thereafter, during the period that the permit remains in force, acquire any further ownership, control, or interest in any such securities company or participate in the management or direction thereof; and (4) agree that thenceforth it will declare dividends only out of actual net earnings.

If at any time it shall appear to the Board of Governors of the Federal Reserve System that any holding company affiliate has violated any of the provisions of the Banking Act of 1933 or of any agreement made pursuant to this section, the Board of Governors of the Federal Reserve System may, in its discretion, revoke any such voting permit after giving sixty days' notice by registered mail of its intention to the holding company affiliate and affording it an opportunity to be heard. Whenever the Board of Governors of the Federal Reserve System shall have revoked any such voting permit, no national bank whose stock is controlled by the holding company affiliate whose permit is so revoked shall receive deposits of public moneys of the United States, nor shall any such national bank pay any further dividend to such holding company affiliate upon any shares of such bank controlled by such holding company affiliate.

Whenever the Board of Governors of the Federal Reserve System shall have revoked any voting permit as hereinbefore provided, the rights, privileges, and fran-

chises of any or all national banks the stock of which is controlled by such holding company affiliate shall, in the discretion of the Board of Governors of the Federal Reserve System, be subject to forfeiture in accordance with section 501a of this title.

* * * * *

§ 82. Limit on indebtedness incurred by bank.

No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, plus 50 percent of the amount of its unimpaired surplus fund. . . .

* * * * *

§ 84. Limit of liability of any person to bank.

The total obligations to any national banking association of any person, copartnership, association, or corporation shall at no time exceed 10 per centum of the amount of the capital stock of such association actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund. The term "obligations" shall mean the direct liability of the maker or acceptor of paper discounted with or sold to such association and the liability of the indorser, drawer, or guarantor who obtains a loan from or discounts paper with or sells paper under his guaranty to such association and shall include in the case of obligations of a copartnership or association the obligations of the several members thereof and shall include in the case of obligations of a corporation all obligations of all subsidiaries thereof in which such corporation owns or controls a majority interest. . . .

* * * * *

§ 93. Violation of provisions of chapter; forfeiture of franchise; personal liability of directors.

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited

Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

4. *FEDERAL BANK HOLDING COMPANY ACT OF 1956, C. 240, §§ 2-9, 70 STAT. 133, AS AMENDED, 12 U.S.C. §§ 1841-48 (1958).*

§ 1841. Definitions.

(a) "Bank holding company" means any company (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this chapter, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees; and for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. . . .

* * * *

(c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

(d) "Subsidiary", with respect to a specified bank holding company, means (1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the

United States) is owned or controlled by such bank holding company; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or (3) any company 25 per centum or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

§ 1842. Acquisition of bank shares or assets.

(a) Prior approval of Board as necessary; exceptions.

It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841 (a) of this title; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank, or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after May 9, 1956 in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

. . . .

(c) Factors governing determination of application for approval.

In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or

companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interests, and the preservation of competition in the field of banking.

(d) Limitation by State boundaries.

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

1843. Interests in nonbanking organizations.

(a) Ownership or control of voting shares of any company not a bank; engagement in business other than that of banking.

Except as otherwise provided in this chapter, no bank holding company shall—

(1) after May 9, 1956 acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from May 9, 1956 or from the date as of which it becomes a bank holding company, whichever is later, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or a bank holding company or engage in any business other than that of banking or of managing or controlling banks or of furnishing services to or performing services for any bank of which it owns or controls 25 per centum or more of the voting shares.

* * * *

§ 1844. Administration.

(a) Registration of bank holding company.

Within one hundred and eighty days after May 9, 1956, or within one hundred and eighty days after becoming a bank holding company, whichever is later, each bank holding company shall register with the Board on forms prescribed by the Board, which shall include such information with respect to the financial condition and operations, management, and intercompany relationships of the bank holding company and its subsidiaries, and related matters, as the Board may deem necessary or appropriate to carry out the purposes of this chapter. The Board may, in its discretion, extend the time within which a bank holding company shall register and file the requisite information.

(b) Regulations and orders.

The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.

(c) Reports required by Board; examinations; cost of examination.

The Board from time to time may require reports under oath to keep it informed as to whether the provisions of this chapter and such regulations and orders issued thereunder have been complied with; and the Board may make examinations of each bank holding company and each subsidiary thereof, the cost of which shall be assessed against, and paid by, such holding company. The Board shall, as far as possible, use the reports of examinations made by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the appropriate State bank supervisory authority for the purposes of this section.

(d) Reports to the Congress; recommendations.

Before the expiration of two years following May 9, 1956, and each year thereafter in the Board's annual report to the Congress, the Board shall report to the Congress the results of the administration of this chapter, stating what, if any, substantial difficulties have been encountered in carrying out the purposes of this chapter, and any rec-

ommendations as to changes in the law which in the opinion of the Board would be desirable.

§ 1845. Investments and borrowing by subsidiaries.

(a) Securities of parent holding company or other subsidiary; collateral security; purchase of securities under repurchase agreement; loans; discount or extension of credit.

From and after May 9, 1956, it shall be unlawful for a bank—

(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company;

(2) to accept the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company, as collateral security for advances made to any person or company: *Provided, however*; That any bank may accept such capital stock, bonds, debentures, or other obligations as security for debts previously contracted, but such collateral shall not be held for a period of over two years;

(3) to purchase securities, other assets or obligations under repurchase agreement from a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company; and

(4) to make any loan, discount or extension of credit to a bank holding company of which it is a subsidiary or to any other subsidiary of such bank holding company.

Non-interest-bearing deposits to the credit of a bank shall not be deemed to be a loan or advance to the bank of deposit, nor shall the giving of immediate credit to a bank upon uncollected items received in the ordinary course of business be deemed to be a loan or advance to the depositing bank.

(b) Exemptions.

The provisions of this section shall not apply (1) to the capital stock, bonds, debentures, or other obliga-

tions of any company described in section 1843(c)(1) of this title, or (2) to any company whose subsidiary status has arisen out of a bona fide debt to the bank contracted prior to the date of the creation of such status, or (3) to any company whose subsidiary status exists by reason of the ownership or control of voting shares thereof by the bank as executor, administrator, trustee, receiver, agent, or depository, or in any other fiduciary capacity, except where such shares are held for the benefit of all or a majority of the stockholders of such bank.

* * * *

§ 1847. Penalties.

Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Board pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this chapter shall upon conviction be fined not more than $10,000 or imprisoned not more than one year, or both. Every officer, director, agent, and employee of a bank holding company shall be subject to the same penalties for false entries in any book, report, or statement of such bank holding company as are applicable to officers, directors, agents, and employees of member banks for false entries in any books, reports, or statements of member banks under section 1005 of Title 18.

§ 1848. Judicial review.

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to

affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

5. CHAPTER 12, TITLE 6, LOUISIANA REVISED STATUTES (CODIFIED FROM LOUISIANA ACT 275 OF 1962)

[the section numbers in brackets indicate sections of Act 275 of 1962]

AN ACT

To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries. [This is the title of the statute as enacted; the title was not codified.]

[§ 1] § 1001. Declaration of policy.

It is declared to be the policy of this State to protect and to foster the growth of the independent unit bank, and [sic] institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries.

[§ 2] § 1002. Definitions.

(A) "Bank holding company" means any company, foreign or domestic, including a bank:

(1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of any bank, or

(2) which controls in any manner the election of a majority of the directors of any bank, or

(3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of any bank or a bank holding company is held by trustees; and for the pur-

poses of this Chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company.

(B) Notwithstanding the foregoing,

(1) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities and which are held only for such period of time as will permit the sale thereof upon a reasonable basis, and

(2) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation.

(3) nor shall this Chapter apply to shares acquired by a bank holding company which is a bank, or by any banking subsidiary of a bank holding company, in satisfaction of a debt previously contracted in good faith, but such bank holding company or such subsidiaries shall dispose of such shares within a period of two years from the date on which they were acquired or from the date of enactment of this Chapter, whichever is later.

(4) nor shall this chapter apply to shares which are held or acquired by a bank holding company which is a bank or by any banking subsidiary of a bank holding company, in good faith in a fiduciary capacity; except where such shares are held for the benefit of the shareholders of such bank holding company or any of its subsidiaries, or to shares which are of the kinds and amounts eligible for investment by National banking associations under provisions of 12 U.S.C.A. §24, or to shares lawfully acquired and owned prior to the date of enactment of this chapter by a bank which is a bank holding company, or by any of its wholly owned subsidiaries.

(C) "Company" means any corporation, business trust, partnership, association, or similar organization doing business in this State, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.

(D) "Bank" means any commercial bank, savings bank, trust company or similar organization doing business in this State.

(E) "Subsidiary", with respect to a specified bank holding company, means

(1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is owned or controlled by such bank holding company; or

(2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or

(3) any company 25 per centum or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

(F) The term "successor" includes any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank.

[§ 3] § 1003. Prohibitions upon acquisition of bank shares or assets.

It shall be unlawful:

(1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Chapter;

(2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank;

(3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or

(4) for any bank holding company or subsidiary thereof to merge or consolidate with any other bank holding company or any subsidiary thereof;

(5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. Notwithstanding

the foregoing, this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

[§ 4] § 1004. Penalties.

Any bank, bank holding company, company, or any subsidiary of any of them which willfully violates any provision of this Chapter, or any regulation or order issued by the State Bank Commissioner pursuant thereto, shall upon conviction be fined not less than $500 nor more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this Chapter shall upon conviction be fined not less than $1,000 nor more than $5,000 or imprisoned not more than one year, or both.

[§ 5] § 1005. Administration.

The State Bank Commissioner shall administer and carry out the provisions of this Chapter and may issue such regulations and orders as may be necessary to discharge this duty and to prevent evasions of the Chapter.

[§ 6] § 1006. Savings clause.

Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of any existing law, nor shall anything herein contained constitute a defense to any action, suit or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct.

APPENDIX B

Illustrative Comments of Regulatory Agencies and Scholars on the Development and Role of Bank Holding Companies

"In the absence of laws permitting branch banking there has been in certain sections a considerable development of so-called chain banks, banks owned or controlled in groups by individuals or by holding companies." FED. RESERVE BD. ANN. REP. 6 (1921).

"Such companies [bank holding companies] have been organized in increasing numbers to operate extensively in the field of banking . . . to acquire control of corporately independent banking institutions . . . and to exercise this centralized control . . . in building up . . . particularly in states which do not permit branch banking . . . chain systems. . . . In some respects the control exercised through stock ownership of a group of banks operated as a system is similar to that exercised by a parent bank over its branch offices." FED. RESERVE BD. ANN. REP. 31 (1927).

"Notwithstanding the technical restrictions in the law against the establishment of branches in the country districts by banks in the cities, there has developed since the McFadden Act a new form of branch banking which appears to be without legal objection. . . . A central financial corporation acquires the controlling interest in the stock of a number of banks, one of which is a metropolitan bank around which the others are grouped. Although technically each bank in the group is a separate corporation operating with a local board of directors, practically each member of the group depends upon a central management which controls the banking policy of the group. The financial responsibility of the central ownership and management is the main support of the group." Address of John W. Pole, Comptroller of the Currency, before the annual convention of the American Bankers Association, 1929, set forth in WILLIT, CHAIN, GROUP AND BRANCH BANKING 162-63 (1930).

"If the laws permitted the establishment of branches in the country districts by these banks, group banking would disappear and the country districts would be able to do business directly with strong city banks." *Id.* at 163.

"While chain and group banking developments have not been generally restricted by provisions in State banking

codes, the area within which these developments have been relatively more considerable in extent is composed largely of states which have prohibited the establishment of branch banking offices—as, for example, in Minnesota, North Dakota, Kansas, Iowa, Illinois, Oklahoma, and Texas." FED. RESERVE BULL., April 1930, set forth in WILLIT, *op. cit. supra* at 144.

"Unlike manufacturers or retailers, bankers could not establish branches except to a very limited extent. Branch banking, except within city limits, is, generally speaking, prohibited by the national bank act and by the laws of most states. The ownership of stock control of one bank by another is likewise forbidden. Therefore, to accomplish the same results that industry had reached by means of consolidations and branches, group banking developed almost overnight, as an entirely new form of banking development." Statement of George F. Rand, President of the Marine Midland Corporation, set forth in WILLIT, *op. cit. supra* at 200.

"We were compelled to carry out our plans by the method of 'group banking' because as already intimated, the laws of New York State and the National Bank Act both prohibit branch banking beyond city limits. It is, therefore, somewhat academic for me to try to compare one system with the other, when only one was open to us." *Id.* at 201.

". . . [A] most significant motive for the increase in the number and activities of bank holding corporations is the desire to circumvent the limitations of Federal and State law in order to be in a position when the necessary laws have been passed to convert into branch banking systems." CARTINHOUR, BRANCH, GROUP AND CHAIN BANKING 129 (1931).

"It has been generally assumed that such developments [the growth of bank holding companies] are in anticipation of extensive legalized branch banking, and are a reaction against statutory provisions pertaining to branch banking under State laws and under the McFadden Act, which forbids the further expansion of branch banking outside city limits by national banks and by State banks which are members of the Federal Reserve System. Undoubtedly

such factors are the most significant motives for group developments. . . ." *Id.* at 120-21.

"The rapid spread and growth of group banking is due in large part to the widespread restrictions on branch banking, which have made resort to some other legal device necessary to effect the purpose." Fordham, *Branch Banks as Separate Entities*, 31 COLUM. L. REV. 975, 976-77 (1931).

"Several cases have existed where the organizers of group systems preferred to establish branches, but the banking laws did not permit them to do so. Under such conditions, the holding company was adopted as a means of accomplishing an end not otherwise possible." CHAPMAN, CONCENTRATION OF BANKING 352 (1934).

"As already mentioned briefly, many group banking systems were organized as a result of legislation in several states prohibiting or rigidly restricting within specific limits the establishment of branches. The organizers apparently, in many cases, hit upon the group system as an alternative—as the next best policy to the setting up of branches. They saw that the holding company, a well-known vehicle in other branches of industry and finance, could be readily applied in banking. In some cases branches were extended where possible within circumscribed areas and a group of separate units acquired to supplement the branches. This policy was followed in California and in Washington where the Marine Bancorporation of Seattle, for example, definitely announced its intention of converting individual units into branches when and where possible." CHAPMAN & WESTERFIELD, BRANCH BANKING 323-24 (1942).

"Unquestionably, group banking has assumed a more important role in this country than elsewhere because of the limitations placed upon branch banking, and it is likely to remain an important type of interbank relation until such time as a major relaxation occurs in the restrictions and prohibitions imposed upon the development of branch systems." LAMB, GROUP BANKING 9 (1961).

"In the closing years of the 1920's, when the opposition to branch systems had reached its peak, the holding company approach to banking concentration began to emerge

in considerable strength in certain sections of the country." *Id.* at 38.

"It is true that most of the group systems originated in those states which placed legal restrictions upon branch banking, though the movement was not limited to these locations. In the former situation they were unquestionably instituted as an alternative plan to achieve some of the advantages of branch banking." *Id.* at 86.

"The holding company form of organization offered the only means of combining control of banks to realize some of the benefits of mergers where branch banking is not permitted or severely limited." NADLER & BOGEN, THE BANK HOLDING COMPANY 10 (1959).

"One can state with a high degree of confidence that if the United States had followed the pattern of the other leading commercial nations and had established nationwide (or even trade-area) branch banking, there would be few, if any, bank holding companies; today, instead of having unit, branch, chain, and group banks, this country would probably enjoy a much more conventional banking system." FISCHER, BANK HOLDING COMPANIES 1 (1961).

"Restrictions on branch banking encouraged the formation of groups for two related reasons. The first was the bankers' expectation that the restrictions would be relaxed and through the use of the holding company they could develop 'ready-made' branch systems in preparation for that event. The second was that while these limitations on branch banking were in effect, business expanded and customers moved to the suburbs and the urban banker often had no other way to follow them." *Id.* at 23.

"Therefore, in sections where branch banks could not be established and investors felt that the formation of a system of banks was economically justified, they have attempted, within the limits of the law, to obtain the desired representation by using some other form of organization. In the states which did not forbid or severely restrict the bank holding company, such a system has frequently been selected as the ideal means of accomplishing the objective." *Id.* at 138.